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United States of America

In the Supreme Court of the United States

October Term 1944

No. 880

CLINTON WOODSON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

Respondent's Brief Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

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INDEX

	Page
I Counter-Statement of Matter Involved	1
II Lack of Jurisdictional Statement	3
III Counter-Statement of Questions Presented	3
IV Reasons for Opposing the Allowance	4
V Argument	
Point One: No federal question was timely raised in the court below, and jurisdiction in this Court is not indicated	5
Point Two: There is no substance in petitioner's contention that the State of Michigan has denied him due process of law (14th Amendment)	9
VI Conclusion	16

Authorities Cited:

Brown v. Mississippi, 297 U. S. 278 ..... 12, 14
Buchalter v. New York, 319 U. S. 427 14
Chambers v. Florida, 309 U. S. 227 13
Ensign v. Pennsylvania, 227 U. S. 592 14
Palko v. Connecticut, 302 U. S. 319 14
Snyder v. Massachusetts, 291 U. S. 97 14
Twining v. New Jersey, 211 U. S. 78 14
Ward v. Texas, 316 U. S. 547 13

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I

Counter-Statement of Matter Involved. [*]

This counter-statement is deemed necessary in correcting the following inaccuracies and omissions in the statement of the other side (Rule 27):

1. In addition to the transcript (14) of testimony educed from petitioner during the proceedings had be-

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[*]

Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

fore the investigating judicial officer,[1] there was further proof to sustain the verdict (158) convicting petitioner of the offense of perjury (4-7) committed by him in testimony (58-78) given during the trial of John Roxborough, Richard W. Reading and others.[2]

Immediately after testifying in the *Roxborough* case, petitioner admitted to the special prosecutor, and to other persons, that he had testified falsely. The prosecutor's testimony (96-102) as to petitioner's admission of perjury was corroborated by an assistant prosecutor (102-103), an assistant attorney general (104-105), and a police officer (119-130). A partner and former business associate of petitioner in the gambling business testified (79-118) as to facts which indicated that petitioner testified falsely in the *Roxborough* case. The court below noted (309 Mich. 391, 398) that 'defendant did not take the stand and offered no testimony in the present case'. (178).[3]

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[1]

Such an investigating magistrate is popularly referred to in this State as a 'one-man grand jury', though the term is somewhat misleading. See: McCrea v. Michigan (No. 651, October Term 1942), 318 U.S. 783; Robinson v. Michigan (No. 474, October Term 1943), 320 U.S. 799; Roxborough v. Michigan (Nos. 98-99, October Term 1944), 89 U.S. [L. ed.] 55.

[2]

People v. Roxborough, 307 Mich. 175 (certiorari denied Oct. 16, 1944, 89 L. ed. 55); People v. Watson, 307 Mich. 596 (certiorari denied Oct. 16, 1944, 89 L. ed. 55).

[3]

The Michigan Supreme Court was 'satisfied that there was material and ample evidence from which the jury, as judge of the facts, could find him guilty beyond a reasonable doubt of the crime charged'.

2. While petitioner repeatedly objected (12, 13, 23, 133, 138, 139, 143, 165, 166) to the use of the transcript of testimony taken by the investigating magistrate, he did not do so on any Federal constitutional ground, and the question now presented was not raised until his counsel moved the court below for a rehearing on appeal (189-205).

II

Lack of Jurisdictional Statement.

It is stated under the heading 'Jurisdiction', in petitioner's supporting brief, that 'the jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C., Section 344)', but neither brief nor petition contain a statement 'particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment . . in question'. This, we respectfully submit, does not meet requirements (Rule 12, par. 1; Rule 38, par. 2).

III

Counter-Statement of Questions Presented.

As we view it, the following questions are to be considered:

1. Does petitioner's statement of jurisdiction comply with the rules of this Court (Rule 12, par. 1; Rule 38, par. 2), and is any Federal question involved in the proceedings below (28 USC § 344 [b])?

2. Is there any substance in petitioner's contention that the State of Michigan denied him the 'due process' guaranteed by the Fourteenth Amendment to the Constitution of the United States?

IV

Reasons for Opposing the Allowance.

Our reasons for opposing the petition may be summarily stated by answering each of the foregoing questions in the negative.

1. No Federal question was raised in the court below until the petitioner moved for a rehearing, and then it came too late.[4] The objections (12-13) interposed to the introduction in evidence of the transcript of testimony given by petitioner before the investigating magistrate, the grounds asserted (130-149) for a directed verdict, and a new trial (161-166), the assignments (1-3) of error on appeal to the State Supreme Court, and the questions decided, were based on nonfederal grounds,[5] and no 'title, right, privilege, or immunity' was specially set up or claimed by petitioner under the Constitution of the United States (28 USC, § 344 [b]).

2. There is no merit in petitioner's contention that he was denied due process.

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[4]
Herndon v. Georgia, 295 U.S. 441.

[5]
Neblett v. Carpenter, 305 U.S. 297,
Alton R. Co. v. Ill. Commerce Commission, 305 U.S. 48,
Honeyman v. Hanan, 300 U.S. 14,
United States v. Hastings, 296 U.S. 188.

V

Argument

Point One

No federal question was timely raised in the court below, and jurisdiction in this Court is not indicated.

This is clearly one of those cases where, after conviction of crime and affirmance of the verdict by the highest State court, the record is combed in the hope that a latent Federal question or some lurking denial of due process may be discovered.

First: Counsel relies on the provisions of § 237-b of the Judicial Code as amended (28 USC, § 344-b), but he has failed particularly to disclose that any constitutional right guaranteed by the Fourteenth Amendment, was asserted, 'set up or claimed' (Rule 38-2; Rule 12-1).

It would perhaps be merely trite to state that, before this Court will assume jurisdiction to review a judgment of the highest court of a State, the Federal right must have been set up and adjudicated by the state court;[6] that such a question is not available here unless presented and ruled upon in the state supreme court, even though raised in the trial court;[7] that a writ of certiorari will be dismissed where the record fails to disclose that the complaining party definitely raised the Federal

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[6]
Cleveland & P. R. Co. v. Cleveland, 235 U.S. 50.

[7]
Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U.S. 341.

question in the State court;[8] and that, in order to raise a Federal question the Federal right must be asserted according to the state procedure.[9]

So, too, this Court will not review the judgment of a state court where it is clear that decision was based on other than Federal grounds.[10]

Second: At no stage of the proceedings in the court of first instance, did petitioner or his counsel raise the Federal question sought to be reviewed here.

1. After the transcript (14) of testimony given by petitioner before the investigating judicial officer, had been authenticated by the court reporter, and when the latter was requested (12) to read the questions and answers, petitioner's counsel objected (12) 'to this unless it contains all of the questions and answers that were put to Mr. Woodson'.[11] The transcript (14-26) was read

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[8]
Missouri Pac. R. Co. v. Hanna, 266 U.S. 184.

[9]
L. & N. R. Co. v. Woodford, 234 U.S. 46.

[10]
Harding v. Illinois, 196 U.S. 78.

[11]
The grounds of such objection were stated by counsel as follows:

"Mr. Rowlette: I object to any testimony as to the specific questions which were asked, at this time, and which, as claimed, is the basis of this lawsuit here, unless all of that testimony is given, for this reason: That there may be other parts of the testimony taken between the hours of 3:00 p.m. and midnight on December 6, 1939, or 2:00 o'clock in the morning, or whatever time it was, or 12:00 midnight, that may clarify these matters and show that there was no perjury or no variance between any testimony taken before Judge Ferguson on December 6, 1939, and the testimony taken before Judge Pugsley on October 22, 1941 (13)".

by the reporter without further objection; and cross-examination was waived (23, 26). It is certain that petitioner asserted no Federal rights guaranteed by the Constitution of the United States.

2. Although counsel correctly states that, 'at the close of the people's proofs, motion for directed verdict was made and denied' (130-149), and while it is also true that petitioner moved the court at the same time to strike from the record the testimony of one Charles Mosley (130), none of these motions was based on any asserted right guaranteed by the Constitution of the United States.

The motion to strike out testimony (130), rested on the sole ground that a conviction of perjury could not be sustained on the uncorroborated testimony of one witness as to the falsity of the matter on which the charge was assigned (131); and the motion for a directed verdict was urged on several grounds: it was urged that petitioner had not been granted immunity[12] from prosecution for any offense concerning which he may have incriminated himself while testifying before the investigating magistrate (133); therefore, it was argued, he was under no obligation to tell the truth on that occasion, and, not being so obligated, the testimony which he gave could not be deemed 'wilful perjury' (133, 134, 138, 139, 149).

But at no time was it expressly claimed that petitioner had been deprived of due process of law (guaranteed by the 14th Amendment), on the ground that he had been compelled in a criminal case to be a witness against himself.

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[12] See Mich. Comp. Laws 1929, § 17220 (Stat. Ann. § 28.946).

3. After a verdict (158) of guilty had been rendered and the defendant had been sentenced, he filed a motion for new trial (161-166), which was denied (168-171). But in none of the grounds assigned therefor, did the petitioner raise a Federal question or assert a Federal right protected by the Constitution of the United States.

Third: On appeal to the Supreme Court of the State of Michigan, no Federal question was raised, and no constitutional right guaranteed by the 14th Amendment, was claimed or asserted. In stating his 'reasons and grounds for appeal and errors relied upon', petitioner did not mention the Federal Constitution or any rights therein protected (1-3).

Furthermore, the court below did not decide a Federal question, nor did it consider or have before it any asserted right protected or safeguarded by the Constitution of the United States. And Mr. Justice Wiest, who dissented, based his opinion on the Constitution of the State of Michigan (1908), art. 2, § 16, and not upon any provision of the Federal Constitution. Both prevailing opinion and dissent undertook to construe a statute of the State (3 Comp. Laws 1929, § 17220 [Stat. Ann. § 28.946]).[13]

Should it be urged that petitioner based his application (189-202) for rehearing by the Michigan Supreme Court, on the claim that his conviction was 'unconstitutional . . . and in violation of the Fourteenth Amendment' (192), and urged that he had been denied due process of law (200), our answer under authority of a decision of this

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[13]

People v. Woodson, 309 Mich. 391, 402.

court,[14] is that such a claim comes too late for consideration.

We, therefore, respectfully submit that jurisdiction in this Court is not indicated.

Point Two

There is no substance in petitioner's contention that the State of Michigan has denied him due process of law (14th Amendment).

For the sake of clarity, it is necessary to bear in mind the skeleton of this case:— that petitioner was charged (4) with the offense of perjury committed while testifying as a witness at the trial of one John W. Roxborough and others in the circuit court for the county of Wayne, on the 22nd day of October 1941; that, as a part of its case, the State sought to prove contradictory statements made by petitioner when testifying under oath on the previous occasion of a judicial inquiry conducted by another judge of the same court, concerning the offense charged in the information against Roxborough and his co-defendants; and that for this purpose the prosecuting attorney offered in evidence an authenticated transcript of petitioner's testimony taken before the investigating judicial officer (14). This transcript was received in evidence over the objections of petitioner's counsel (12, 13).

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[14]
Herndon v. Georgia, 295 U. S. 441.

The statute which authorizes such a judicial inquiry,[15] provides in part:

> "Sec. 6. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him".

Petitioner's argument is based on the premise that, when called as a witness before the investigating judge, he refused to answer certain questions 'for fear it might incriminate myself' (14, 15); that he was granted immunity upon the oral motion of a lawyer who appeared as *amicus curiae* 'to the grand jury', so-called; that the motion was not reduced to writing as required by the above statute;[16] that the grant of immunity was illegal because not in compliance with the statute; that he was compelled to testify by the investigator and, therefore, his testimony was not voluntary; and that such testimony could not be used against him in his subsequent trial for perjury. The contention is that, since his conviction rested upon what amounted to an extorted confession, he

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[15]

Act No. 175, chap. VII. § 6, Pub. Acts Mich. 1927 (3 Comp. Laws 1929, § 17220 [Stat. Ann. § 28.946]).

[16]

In re Wyrick, 301 Mich. 273,
In re Hickerson, 301 Mich. 278.

was denied due process, and he must be set at liberty under authority of recent decisions of this Court.[17]

1. Several valid, if not controlling, answers to petitioner's contention are found in the opinion of the court below.[18]

This Court will probably feel bound by the construction placed by the Michigan Supreme Court upon the language of the statute in question here,[19] when it said (p. 397):

> "The immunity statute expressly protects a witness against prosecution for any offense concerning which his answers may tend to incriminate him, but it does not protect him from an offense subsequently committed".

And it is observed that

> "defendant's answers before the grand jury did not relate to the offense of perjury, which he committed two years later and, therefore, his answers did not then tend to incriminate him as to such offense".

In short, the statute did not grant him a license to commit perjury with impunity.

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[17]
Ashcraft v. Tennessee, 322 U.S. 143,
Ward v. Texas, 316 U.S. 547,
Chambers v. Florida, 309 U.S. 227,
Brown v. Mississippi, 297 U.S. 278.

[18]
People v. Woodson, 309 Mich. 391.

[19]
11 Am. Jur., Constitutional Law, § 109, note 16, p. 744.

Another answer is found in this common-sense view of the matter (p. 397):

> "As he apparently testified before the grand jury in reliance upon and without questioning the legality of the purported grant of immunity, it may reasonably be inferred that he testified the same and as truthfully as though immunity had been granted in conformity with the statute. . . . Apparently he received the immunity which the statute intended, as there is no showing that he was ever prosecuted as a result of incriminating answers".

2. There is no evidence to sustain the theory that petitioner's conviction was based on a 'confession' extorted from the accused by torture or other means in violation of that due process of law which is guaranteed by the Fourteenth Amendment, and the line of authority upon which petitioner relies (the *Brown*, *Chambers*, *Ward* and *Ashcraft* cases cited in footnote 17 *ante*), does not support his contention.

It is first noted that in each of those cases, conviction rested solely on the compulsory confession.

In *Brown v. Mississippi*, 297 U. S. 278,

> "aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury",

and this Court say:

> "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to

> procure the confessions of these petitioners, and the use of the confessions thus obtained *as the basis of conviction* and sentence was a clear denial of due process".

In the case of *Chambers v. Florida*, 309 U. S. 227, the Court observed:

> "When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors",

who, like him, had been subjected to brutal treatment.

And in *Ward v. Texas*, 316 U. S. 547, it is said:

> "(p. 549) The Court of Criminal Appeals in its final opinion denying petitioner's motion for rehearing concluded 'It may be stated bluntly that no conviction could be sustained in the present case without the confession of appellant' ".

The court below, in the instant case, after reciting established facts other than the contradictory statements found in the grand jury transcript of testimony (petitioner's admissions voluntarily made to the prosecuting attorney, and other persons; the testimony of petitioner's former partner in gambling ventures, 'as to facts which indicated that he testified truthfully before the grand jury and falsely in the *Roxborough* case'), was satisfied 'that there was material and ample evidence from which the jury, as judge of the facts, could find him guilty beyond a reasonable doubt of the crime charged' (p. 398).

In the case at bar, conviction did not rest solely upon a 'confession', for there was other evidence to sustain it; the statements found in the transcript of testimony taken before the judicial investigator, were not in the nature of 'confessions' to the crime of perjury charged in the information in the pending cause; and it cannot be said that such statements were coerced by methods 'revolting to the sense of justice' (*Brown*), or by means of 'the rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross-questioning, and other ingenious forms of entrapment of the helpless or unpopular' (*Chambers*).

The sole compulsion in this case was merely that which is brought to bear on any witness who is called to perform this duty of citizenship.

3. The question then is whether exemption from compulsory self incrimination in the state courts is secured by any part of the Federal Constitution.

But that question is no longer open to debate,

> *Twining v. New Jersey*, 211 U. S. 78,
> *Ensign v. Pennsylvania*, 227 U. S. 592,
> *Snyder v. Massachusetts*, 291 U. S. 97, 105,
> *Brown v. Mississippi*, 297 U. S. 278,
> *Palko v. Connecticut*, 302 U. S. 319,
> *Buchalter v. New York*, 319 U. S. 427, 429.

A State is 'free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . The privilege

against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State' (*Snyder*).

The right of immunity from compulsory self-incrimination 'might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry' (*Palko*).

Manifestly, then, this Court has drawn a clear line of demarcation between rights asserted under the 'self-incrimination' clause of Federal or State Constitutions, and rights asserted under the due process clause of the Fourteenth Amendment. Under those decisions it is established that a State's withdrawal of the guarantee against self-incrimination is not a denial of due process (*Twining* and *Palko*), but where a conviction rests solely upon a confession illegally and wrongfully obtained through force and violence or mental torture, it cannot be permitted to stand under the due process clause of the Fourteenth Amendment (*Brown, Chambers, Ward* and *Ashcraft*).

Indeed, it may truthfully be said that, in the latter instance, the accused has had no trial, but the question of his guilt or innocence has been determined by tyrants within the precincts of their own torture chamber, rather than in a court of competent jurisdiction (*Chambers*).

Moreover, 'the Amendment does not draw to itself the provisions of state constitutions or state laws' (*Buchalter*).

VI

Conclusion:

No Relief.

On the face of the record, we respectfully submit, petitioner is entitled to no relief, and the writ of certiorari should be denied.

Respectfully submitted,

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